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IN THE

Supreme Court of the United States

October Term, 1968

No. 333

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

ALLIED AIR FREIGHT INTERNATIONAL CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Pan American World Airways, Inc., asks that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered in this case on April 25, 1968.

Opinions Below

The opinion of the Court of Appeals is reported at 393 F.2d 441 and is annexed hereto as Appendix A. The opinions of the United State District Court for the Southern

District of New York are not officially reported and are annexed hereto as Appendix B.

Jurisdiction

The decree of the United States Court of Appeals for the Second Circuit here sought to be reviewed (App. A) was entered on April 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the Civil Aeronautics Board ("CAB") has primary jurisdiction over a claim that an unfiled alleged agreement between air carriers, the implementation of which had ceased prior to the time an action was begun in the District Court, violated the anti-trust laws and thereby gave rise to an action for damages.

Statutes Involved

Section 412 of the Federal Aviation Act of 1958, as amended (49 U.S.C. §1382) reads as follows:

> "(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pool-

ing or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

"(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. Pub. L. 85-726, Title IV, §412, Aug. 23, 1958, 72 Stat. 770."

Section 414 of the Federal Aviation Act of 1958, as amended (49 U.S.C. §1384) reads as follows:

"Any person affected by any order made under sections 1378, 1379, or 1382 [Federal Aviation Act §412] of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws', as desingated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. Pub. L. 85-726, Title IV, §414, Aug. 23, 1958, 72 Stat. 770."

Statement of the Case

This case comes from the United States Court of Appeals for the Second Circuit which reversed an order of the United States District Court for the Southern District of New York dismissing, without prejudice, for failure to prosecute, a civil action for treble damages under Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act.

Respondent and Allied Air Freight, Inc.* were air freight forwarders in the New York-Puerto Rico market, and therefore were "air carriers" by the terms of the Federal Aviation Act of 1958. The service of an air freight forwarder is to receive goods destined for air carriage from the consignor and deliver them to the air carrier; then, upon their arrival at the airport of destination, to receive the goods from the air carrier and deliver them to the consignee. An air freight forwarder derives some profit from handling charges, local cartage, and other similar fees. However, the principal part of an air freight forwarder's revenues is derived from the differential between the rate he is authorized to charge a shipper for a characteristically small air freight shipment and the lesser rate he pays the airline carrier for the larger shipments into which he consolidates a number of small shipments.

Respondent's complaint (pars. 22-29) alleged an "agreement" in the form of a conspiracy in restraint of trade be-

* Allied Air Freight, Inc. did not appeal to the Court of Appeals nor is it a respondent here. Therefore, all references to the proceedings in the trial court will deal only with Respondent.

tween Petitioner, an air carrier, and Add Airfreight Corp. ("Add"), another air freight forwarder, to secure for Add a monopoly position in the air freight forwarding business between New York and Puerto Rico and to secure for Petitioner a monopoly of air freight carriage in that market. In furtherance of this agreement, it is claimed that Petitioner embargoed and backlogged goods being forwarded by Respondent both on planes going from New York to Puerto Rico and from Puerto Rico to New York. Moreover, Petitioner, in conjunction with Add, is supposed to have solicited Respondent's customers for Add, promising quicker service. This alleged conspiracy is said to have ended when Add "turned on its co-conspirator" and entered into an arrangement with a competing airline.

Soon after the complaint was filed in January, 1964, the District Court stayed all proceedings until Respondent exhausted its available remedies before the CAB. The stay was granted upon motion of Petitioner that primary jurisdiction over the allegations in the complaint had been vested by Congress in the CAB by virtue of the Federal Aviation Act of 1958, as amended. The District Court reaffirmed this conclusion on reargument, and Respondent appealed to and also sought a writ of madamus from the Court of Appeals. That Court dismissed the appeal as having been improperly taken from an interlocutory order and denied the application for mandamus. 340 F.2d 160 (1965). This Court then denied a petition for a writ of certiorari. 381 U. S. 924 (1965).

Thereafter, Respondent took no steps to submit the matter to the Civil Aeronautics Board during the period of

time from the issuance of the stay order in 1964 until June, 1967, at which time the case was called on the Review Calendar of the District Court. Upon the review of the calendar, the District Judge ordered that the case should be dismissed without prejudice unless within 90 days the Respondent took action to obtain a determination of the suit. The Respondent failed to take such action and the case was therefore dismissed.

After Respondent's action was dismissed by the District Court in September, 1966 for failure to proceed, an appeal was taken to the Court of Appeals which reversed the dismissal, vacated the stay and remanded the case to the District Court. It is this action by the Court of Appeals which Petitioner seeks review of here.

The gist of the Court of Appeals' decision (Lumbard, Ch. J.) is that primary jurisdiction does not lie with the CAB when a complaint alleges that an unfiled agreement that violates the anti-trust laws has terminated, and merely damages, rather than an injunction, is sought by way of relief. Resort to the CAB in such a case would be a "futile gesture," according to the Court, since the CAB cannot grant damages and future conduct of the parties is not involved. Although the Court recognized that an allegation of an agreement between air carriers which was still in effect would require cession of primary jurisdiction to the CAB for determination as to whether the agreement should be immunized from the operation of the anti-trust laws, it assumed *sub silentio* that the CAB could not immunize an agreement that had allegedly been terminated prior to the bringing of the action, and ruled therefore

that primary jurisdiction was not in the CAB. The Court erred in assuming that the CAB lacked the power retroactively to give anti-trust immunity to an agreement no longer in effect between air carriers.

Reasons for Granting the Writ

I. The decision of the Court of Appeals is in conflict with this Court's decision in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966) because the alleged agreement was "arguably lawful" as the CAB had power to approve it retroactively and thereby immunize it from the anti-trust laws.

The decision of the Court of Appeals is in direct conflict with this Court's decision in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966). As such, it should not be allowed to stand unreviewed, for it contravenes the policy of ceding primary jurisdiction to the body best able to deal with a question initially and will precipitate inconsistent regulation of parties similarly situated.

Carnation involved allegations of anti-trust violations arising from implementation of rate-maintenance agreements that had not been filed with the Federal Maritime Commission ("FMC"). This Court held that Section 15 of the Shipping Act, 46 U.S.C. §814, precludes retroactive validation by the FMC of an unapproved rate-maintenance agreement and, therefore, that a court did not have to cede primary jurisdiction over the clearly unlawful agreement to the FMC as that body could not perform any useful function in relation thereto. However, because the re-

spondents in *Carnation* contended that the agreement had been impliedly approved by the FMC in an earlier proceeding, this Court held that a stay and reference to the FMC was proper, as respondents' conduct was "arguably lawful" under the Shipping Act and, if the FMC found it had approved the agreement, immune from the anti-trust laws.

The Court of Appeals misconstrued this "arguably lawful" criterion when it held that the instant case was not within the CAB's primary jurisdiction. For the Court assumed that an unfiled alleged agreement, the operation of which has terminated, could not be retroactively approved by the CAB under Section 412 of the Federal Aviation Act, 49 U.S.C. §1382 and hence concluded that resort to the CAB would be a "futile gesture" which would serve no useful purpose. The Court failed to note the clear difference between the wording of Section 412 of the Aviation Act and that wording of Section 15 of the Shipping Act that was critical to the decision in *Carnation*. Section 15 of the Shipping Act reads, in part, as follows:

> "The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.
>
> • • •
>
> All agreements, modifications, or cancellations made after the organization of the Board shall be law-

ful only when and as long as approved by the Board, and *before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.*

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto." (Emphasis supplied.)

This language was held by this Court to preclude retroactive validation of an agreement by the FMC. In contrast, Section 412 of the Aviation Act, quoted at pp. 2-3, *supra*, contains no language that explicitly makes it unlawful to carry out an unfiled agreement. Thus, the CAB could retroactively validate an agreement that had not previously been filed and could thereby confer upon the parties immunity from the anti-trust laws pursuant to Section 414 of the Aviation Act, quoted at p. 3, *supra*. Whether the CAB will take cognizance of and validate an agreement that is no longer in effect is for the agency to decide; it clearly has statutory power to do so, and therefore the administrative proceeding would not be a "futile gesture," as the Court of Appeals suggested. P. 8A, *infra*. The CAB should, therefore, have primary jurisdiction. See *Carter* v. *American Telephone & Telegraph Co.*, 365 F.2d 486, 499 (5th Cir. 1966), *cert. denied*, 385 U. S. 1008 (1967).

Further, the existence of a question as to whether the CAB will immunize the alleged terminated agreement indicates that the practices under the agreement complained of by Respondent are "arguably lawful". The Second Circuit assumed, without discussion and erroneously, that

the CAB could not retroactively validate an agreement of the kind here alleged. This error should not stand unreviewed.

In addition, the instant decision is inconsistent with the Second Circuit's decision in *Maddock & Miller, Inc.* v. *United States Lines,* 365 F.2d 98 (1966), which followed and drew heavily upon *Carnation.* The case involved three claims, two of which were clearly outside the agency's jurisdiction and the third of which was clearly within the agency's jurisdiction but only tangentially related to the other two. Nonetheless, the Court properly referred all claims to the agency due to its "extensive experience in dealing with the industry." In the instant case, the CAB's expertise with respect to the operation of the air carriage industry, its economics and the practices and modes of carrying on its business support the conclusion that that body should first determine the propriety of the claimed agreement between Petitioner and Add and such related questions as whether Respondent's insolvency resulted from such an agreement or from other aspects of its position in the New York-Puerto Rico air transportation market.

II. To make primary jurisdiction of the CAB depend on a plaintiff's election to request relief only for past acts would disrupt the orderly administration of the regulatory scheme.

The decision by the Second Circuit unduly narrows the field of primary jurisdiction, thereby raising very significant possible effects. Under Section 412 of the Aviation Act, any "contract or agreement" between air carriers

must be filed with the CAB, which then approves or disapproves it depending upon the "public interest." Merely by alleging that the agreement no longer is in effect, however, a plaintiff can, under the Second Circuit test, evade the primary jurisdiction of the CAB. Such jurisdiction could be evaded whether or not the agreement is still in effect, as the critical question to the Second Circuit is whether only past harm is complained of. This is highlighted by footnote 3 to the Court's opinion, p. 9A, *infra,* which deals with Respondent's attempt to amend its complaint to delete allegations that contained an element of currency. Certainly this presents the likelihood of inconsistent regulation of the practices and dealings of air carriers, depending upon whether a plaintiff complains merely of past injury or also of current harm. For it is entirely conceivable that the CAB would approve, as in the public interest, an agreement between air carriers which, if the plaintiff requested only damages for past harm, might be the basis for a judgment for treble damages in the district court. This is out of step with the theory of *Carnation* and might precipitate grossly inconsistent regulation of competing air carriers whose practices are identical.

Conclusion

This Court is presented with an important question of the proper limits of the doctrine of primary jurisdiction that will have great impact upon the scheme of regulation of air carriers and the administration of the antitrust laws. The decision below overly narrows the jurisdiction of the administrative agency, and thereby threat-

ens the integrity of the regulatory scheme. This Court should, therefore, review this decision.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit